EAST CANYON IRRIGATION CO.

IBLA 79-83, 79-136 Decided May 6, 1980

Appeal from decisions of the Utah State Office, Bureau of Land Management, terminating special land use permit #U-11-6, and rejecting rights-of-way applications for operation and maintenance of water well facilities.

Affirmed in part, vacated and remanded in part.

1. Water and Water Rights: Generally -- Water and Water Rights: State Laws

   When considering applications for rights-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

2. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Rights-of-Way

   The standard of review in the case of rights-of-way applications for domestic water pipelines is whether the decisions demonstrate a reasoned analysis of the factors involved, with due regard for the public interest. A decision by BLM, made in exercise of its discretion, will be affirmed in the absence of sufficient reason to disturb it.

3. Federal Land Policy and Management Act of 1976: Generally

"Public sentiment" and/or "public opposition" are not synonymous with "the public interest" as used in FLPMA. That Act addresses the "national interest." BLM is not required to accede to the wishes of a vocal group in making its decision.

4. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Generally

Where the bases of decisions rejecting rights-of-way applications for domestic water facility are contradicted by the Environmental Analysis Report on the project and alternatives enumerated therein, and where BLM failed to consider possible mitigating actions suggested by appellant, the decisions will be vacated and remanded for further consideration.

5. Administrative Procedure: Generally -- Appeals -- Federal Land Policy and Management Act of 1976: Permits -- Special Use Permits

The effect of a timely filed notice of appeal is to suspend the authority of the deciding official to exercise jurisdiction relating to the subject of the appeal. It does not have the effect, however, of suspending the authority of BLM to act on matters which, while related to the subject of the appeal, are nevertheless functionally independent therefrom.

6. Federal Land Policy and Management Act of 1976: Permits -- Special Use Permits

Failure to pay the annual rental for a special land use permit constitutes sufficient ground for termination of the use. 43 CFR 2920.4(a).

APPEARANCES: H. Byron Mock, Esq., Salt Lake City, Utah, counsel for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

East Canyon Irrigation Company appeals from various decisions 1/ of the Utah State Office, Bureau of Land Management (BLM). By decisions dated October 13, 1978, rights-of-way applications for an existing and proposed well, a 12-foot road, and two pump houses (U-17632), a 480-volt powerline (U-31551), and a water pipeline, and access road (U-31570), were denied in their entirely for reasons to be discussed. By decision of November 21, 1978, extension of Special Land Use Permit (SLUP) 2/ #U-11-6, which authorized the drilling of an exploratory water well, 3/ was denied on grounds which will be discussed, infra.

Appellant holds a perfected right 4/ to one-sixth or 1.67 cubic feet per second (cfs) of the natural flow of the waters of Johnson Creek (also known as Johnson Wash) in Kanab, Utah. Over the years, the creek's natural flow has decreased steadily, and as a result, appellant receives less than its full entitlement. Sometime in 1970 appellant therefore filed change application No. a-6367 with the Utah State Engineer's Office, to change the point of diversion of all or part of its water entitlement through one or all of 11 proposed well sites. Eight of the sites were to be located on public land. In December 1970, BLM and interested parties who reside in the area formally protested approval of the proposed change. The protest hearing was held on April 1, 1971. At this hearing, on BLM's suggestion that it would be more favorably disposed toward anticipated rights-of-way applications, appellant, through its officers, eliminated all but well site Nos. 1, 2, 3, and 4.

No further action transpired until January 12, 1972, when BLM received an undated request from appellant, which was deemed an application for a right-of-way (U-17362) to drill two water wells, a 12-foot road, two pump houses, and the right to convey water therefrom off public land.

1/ On appellant's motion, IBLA 79-83 (U-17632, U-31551 and U-31570) and IBLA 79-136 (SLUP #U-11-6) are hereby consolidated for consideration.

2/ Prior to enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, 43 U.S.C. §§ 1701-82 (1976), uses or activities not otherwise provided for by law were authorized under 43 CFR 2920.0-2(a) and 2920.0-3 and were denominated as SLUP's. Since enactment of FLPMA, such permits are designated temporary use permits (TUP's). FLPMA, section 504(a), 43 U.S.C. § 1764(a) (1976). For purposes of this appeal we will continue to use the earlier term, as it appears on the face of the permit itself.

3/ The test well (No. 3) appurtenances and proposed additional well site (No. 3a) are situated in NE 1/4 NE 1/4 NE 1/4 sec. 27, T. 42 S., R. 5 W., Salt Lake meridian.

4/ Chidester Decree of April 28, 1909, Western Utah Circuit, No. 85-325.

In the letter dated February 2, 1972, acknowledging receipt of the documents filed pursuant to the Act of March 3, 1891, 26 Stat. 1011, as amended, 43 U.S.C. § 946 (1970), 5/ BLM granted advance permission to appellant to occupy the land and commence construction of the facilities. The advance permission was for a period of 1 year, subject to certain requirements enumerated in the letter. Appellant was further advised that such advance consent was revocable at will, the risk of which lay solely with appellant, and that it should not be construed as a commitment with respect to final disposition of the right-of-way application.

On September 10, 1973, appellant's change application No. a-6367 (85-325) was allowed by the State Engineer over all protests. The State Engineer held that the surface and subsurface waters of Johnson Creek are directly connected and that appellant should be allowed to pump groundwater and to change the point of diversion of its water.

Of the conditions enumerated in the decision, only two are germane to this inquiry. Condition 5 limits the amount of groundwater to be diverted to the amount of surface deficiency, and also prohibits enlargement of the irrigation area beyond the acreage identified in the Chidester Decree, which had granted certain water rights to appellant's predecessor-in-interest. Condition 6 provides that appellant shall replace water or compensate holders of water rights of earlier or equal priority for loss of water occasioned by appellant's pumping of the subject wells.

Appellant therefore filed an application dated October 2, 1973, for authorization to erect an exploratory test well (No. 3 site), temporary service road, and powerline. The application was approved on October 12, 1973, as a special land use permit (SLUP) of 1 year's duration in advance of approval of anticipated rights-of-way applications, subject to stated stipulations. The SLUP was annually extended through 1974-75 and 1975-76 on appellant's request. The latter extension was approved for the reason that the State Engineer had not advised appellant of the amount of water it would be allowed to pump.

On November 10 and 19, 1975, appellant submitted applications for a 480-volt powerline (U-31551) pursuant to the Act of March 4, 1911, 43 U.S.C. § 951 (1970), 6/ and a water pipeline and access road (U-31570) pursuant to the Act of March 3, 1891, 43 U.S.C. §§ 946-49 (1970). 7/

5/ Repealed by FLPMA, section 706(a), 90 Stat. 2793 (1976).
6/ Repealed. Id.
7/ Repealed. Id.

The U-31551 (powerline) and U-31570 (water pipeline) case files were transmitted from the Utah State Office to the District Manager, Cedar City, on January 21, 1976, for an Environmental Analysis Report (EAR), land reports and recommended stipulations. The EAR for these rights-of-way, as well the two water wells (U-17632) was approved by the District Manager on September 25, 1978. On October 18, 1976, BLM extended the SLUP through the 1976-77 calendar year, and advised appellant that "[s]ubsequent renewals may be required until we can schedule completion of the necessary field reports on your right-of-way applications U-31551 and U-31570." We assume, since the record does not contain a letter request from appellant, that this extension was unilateral on BLM's part.

By letter dated June 22, 1977, appellant was advised that review indicated that the field reports for the SLUP were inadequate to authorize an additional test well (designated No. 3a). Application forms for a second SLUP were enclosed for completion and return. The letter further stated that "[p]rogrammed commitments makes [sic] consideration of your request unlikely before October 1977."

On June 27, 1977, BLM received a written protest against appellant's proposed actions, signed by many area residents who hold water rights in Johnson Creek. That protest also alleged significant environmental damage from erosion due to the pumping of appellant's test well No. 3, and also requested the formulation of a detailed EAR.

Under date of July 12, 1977, appellant's second SLUP application for the additional test well (No. 3a) was returned with the explanation that success of nearby well No. 3 rendered the application unnecessary, and that the pending rights-of-way applications should be amended to include the proposed second well.

Appellant evidently applied to the Kane County Agricultural Soil and Conservation Service (ASCS) for a cost sharing of the proposed second well in 1977. In response to a memorandum from the ASCS in August 1977 requesting evidence of appellant's authorization therefor, BLM advised ASCS that appellant had not amended the right-of-way application as of August 31, 1977, to embrace well No. 3a. On appeal, appellant states that this action on BLM's part resulted in loss of a promised cost-sharing loan.

The letter also mentioned that John Kenyon Little, then president of East Canyon Irrigation Company, had, on August 30, advised BLM that he was in the process of transferring his interests in Johnson Canyon and the corporate appellant to his brother, Larry Little. Thereafter, on October 21, 1977, BLM extended the SLUP through 1978.

On November 27, 1977, BLM conducted a public hearing to discuss the EAR, at which appellant was represented by its principal officers. A partial transcript of that meeting is included in the record, and will be discussed more fully, infra.

Several days later, appellant offered to resolve the dispute by proposing to use the Johnson Creek channel to convey only that water not affected by change application No. a-6367. As to the water flow to be diverted under that application, appellant stated it would obtain necessary rights-of-way across private property and convey the water via "low head plastic pipeline" from the wells to the place of use.

As evidenced by statements made by BLM in a letter dated May 12, 1978, to residents of Johnson Creek, Larry Little, brother of John K. Little, visited the BLM office with another proposed resolution of the dispute. Provided sufficient water could be obtained from sites located at the mouth of Flood Canyon, Mr. Little stated that the Johnson Creek sites Nos. 3 and 3a would be abandoned. Mr. Little further indicated that powerlines to the Flood Canyon facility would be buried, and that any water obtained would be conveyed by pipeline. Comments from residents of the area were invited. It appears from a March 26, 1978, memorandum from the District Manager, Cedar City, to the State Director, that the proposed Flood Canyon project is a separate case unrelated to the cases presently under consideration.

Finally, Eric Little, a family member whose precise relationship to appellant is unclear from the record, in a letter dated August 16, 1978, reiterated his family's willingness "to attempt any alternative [as set forth in the EAR] that would facilitate speedy restoration of our water."

As noted earlier, the rights-of-way applications were denied on October 13, 1978. The SLUP was cancelled on November 21, 1978. By letter dated December 9, 1978, the Utah State Engineer ordered appellant to plug and abandon well No. 3 on the ground that the construction and operation of the well created unsafe conditions contrary to applicable provisions of State law, with particular regard to the subsidence at the site. Thereafter, on January 31, 1979, that order was rescinded on the ground that "further investigation was warranted."

In March 1979 counsel for appellant requested permission to resolve the subsidence problem. It appears that this request was necessitated by the fact that BLM had forbade any curative action until after appellant's principals, BLM, and the State Water Engineer met to establish a rehabilitation plan. In this letter, counsel refers to "repeated requests and attempts to consult with BLM on this matter."

With regard to the decision rejecting the rights-of-way applications, three grounds were stated as supporting the rejection. The first ground assigned was captioned "Public Sentiment Against the Proposed Action." This portion of the decision began with the conclusion that the proposed action is not in the public interest, and adverted to 43 CFR 2801.1-5(h), infra, as well as FLPMA, section 505(b)(vi), 43 U.S.C. § 1765(b)(vi) (1976).

The second portion of the decision discussed environmental damage which would result from the proposed action. Relying in part on the EAR, the decision identified environmental damage generated by sand pumped from the existing well (No. 3).

The third section of the decision was captioned "Flood Plains," and stated that the proposed project is situated within an "intermittent streambed that is subject to regular and severe flash flooding." A statement summarizing Geological Survey flood data for the period 1961-74 followed. The decision then cited Exec. Order No. 11988, 42 FR 26951 (May 25, 1977), as support for the proposition that "[t]he intent of Exec. Order No. 11988 is to discourage development by the public on any flood plain where the potential for flood loss can impact human safety, health and welfare." In this connection it was observed that the guidelines for Federally-funded projects are more stringent under the Executive order, and these guidelines were applicable to appellant because of its application to the county ASCS for cost sharing with respect to the drilling of the second well (No. 3a).

In the letter-decision of November 21, 1978, which cancelled SLUP #U-11-6, the Area Manager first noted that appellant had recently requested a special use permit "to maintain, operate and improve a well pipeline and road." This request was rejected on the ground that the law provided for the acquisition of such rights through the grants of rights-of-way, and thus a SLUP (now referred to as a TUP -- temporary use permit) could not properly be issued for such use, citing 43 CFR 2920.0-2(a). The letter-decision then noted, in response to a statement by appellant's attorney, that appellant had never been granted authority to convey water under SLUP #U-11-6. Rather, that SLUP was, by its terms, limited to the purpose of drilling a test water well.

The letter-decision also stated that the SLUP had been renewed on an annual basis pending appellant's filing of a formal right-of-way, "which they failed to do in a diligent manner." Finally, the letter-decision noted that, under the terms of the SLUP, the annual advance rental was required. While rental was due on or prior to October 12, 1978, no such rental had been tendered. Accordingly, SLUP #U-11-6 was cancelled.

Appellant frames the issues presented by this appeal as follows:

1. Whether, as to appeals pending before this Board, BLM retains any jurisdiction over the subject matter of such appeals.

2. Whether a purported exercise of jurisdiction by BLM over a matter on appeal to this Board is of any force or effect.

3. Whether "control and appropriation of water rights" is properly a matter to be resolved by the Department of the Interior.

4. Whether BLM adequately considered all pertinent facts and less stringent alternatives to the proposed action by which statutory mandates might be achieved.

5. Whether the decisions demonstrated a reasoned analysis of the facts.

6. Whether the decisions are supported by the record herein.

Appellant also alleges that an EAR was prepared by a team of BLM specialists in 1973 for use in evaluating the SLUP. That document is not in the record, although appellant argues that the 1973 EAR "carefully considered all environmental aspects of the proposed development and concluded that approval should be granted for the project." There are references to field and land reports in memoranda contained in the SLUP case file which may or may not be part of the 1973 EAR to which appellant refers. Our view of the posture of this appeal renders the issue of the alleged existence and disappearance of the 1973 EAR superfluous.

While the first two issues raised by appellant concern the SLUP, we prefer to discuss the decisions chronologically, and so will postpone consideration of the SLUP and begin with the third issue, which challenges the Department's purported attempt to control the appropriation of water rights.

[1] Initially, we reject the proposition that BLM's actions herein are tantamount to an improper exercise of jurisdiction over a matter committed to State law. BLM's involvement in these cases is not, under any construction, an attempt to divest or readjudicate water rights decreed by the courts of Utah. BLM's nexus to the instant cases is grounded solely on the fact that the well sites are situated on Federal land which necessitates, under applicable Federal law, applications for rights-of-way in order to occupy, operate, and maintain the facilities proposed by appellant in exercise of its right to a portion of waters of Johnson Creek. When considering an application for determination of right-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of State law. Broken H. Ranch Co., 33 IBLA 386 (1977); Harold C. Brown, A-30536, 73 I.D. 172 (May 31, 1966); Hatch Brothers Co., A-27525 (Jan. 13, 1958).

[2] Issues four, five, and six are essentially aspects of the same question and will be so treated as we analyze the bases for the decision to reject the rights-of-way applications. In the instant case, the standard of review is whether the decisions demonstrate a reasoned analysis of the factors involved, with due regard for the public interest. A decision by BLM, made in exercise of its discretion, will be affirmed in the absence of sufficient reason to disturb it. Stanley S. Leach, 35 IBLA 53 (1978); Broken H. Ranch, supra.

[3] The first reason advanced by BLM is that the contemplated action is not in the public interest, and that compatibility with the public interest is a condition precedent to approval of a right-of-way, citing 43 CFR 2801.1-5. That regulation provides in material part:

> An applicant, by accepting a right-of-way, agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case:
>
> * * * * * * *
>
> (h) To comply with such other specified conditions, within the scope of the applicable statute and lawful regulations thereunder, with respect to the occupancy and use of the lands as may be found by the agency having supervision of the lands to be necessary as a condition to the approval of the right-of-way in order to render its use compatible with the public interest. [Emphasis supplied.]

BLM interpreted the above regulation to mean that "as a condition to the approval of a right-of-way its use must be compatible with public interests" (emphasis supplied). Noting that 96 percent of the land to be traversed by the rights-of-way is privately owned, the decision stated:

> Public sentiment, as judged from a public meeting and letters from the Johnson Canyon landowners, is weighted heavily in opposition to the granting of the rights-of-way. The opposition centers mainly on concerns over degradation of private land by the increased water flow in the wash from the existing and proposed well. There seems to be no way to mitigate the proposed action to render the right-of-way use compatible with the public interest.
>
> * * * Since public opinion stands in opposition to the project, this fact outweighs any beneficial impacts identified.

In support of the propositions above set forth, the decision cited section 505(b)(vi) of FLPMA, supra, the authority implemented by 43 CFR 2801.1-5, supra. That section states: "Each right-of-way shall contain -- (a) terms and conditions which will * * * (b)(vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."

In connection with this portion of the decision, appellant argues that "public sentiment" is not synonymous with "public interest" as

the latter term is used in FLPMA, and denies the statement that "there seems to be no way to mitigate the proposed action."

We agree with appellant that "public sentiment" and/or "public opposition" are not synonymous with "public interest." While it is not difficult to conceive of circumstances in which the terms blur significantly, such is not the case with regard to administration of the public domain under FLPMA. That Act used the term "public interest" in its broadest sense: i.e., to describe the entire spectrum of legally cognizable interests of the general public in the various resource and other values of the public lands. Of necessity, the "public interest" in this context includes narrower penumbral interests as, for example, those of the several governments, of regions, or of occupants and users of the public lands, or of adjacent land owners. We hold that it is error to state, "Since public opinion stands in opposition to the project, this fact outweighs any beneficial impacts identified" (Emphasis supplied).

Thus, although public sentiment or opposition is indeed a factor in evaluating where, given a set of circumstances, the public interest may lie, we find no authority to substitute public sentiment or opposition for the broad public interests identified and discussed throughout the Act. FLPMA, section 102(a)(5), (a)(8), and (a)(12), 43 U.S.C. § 1701(a)(5), (a)(8), and (a)(12) (1976); and see FLPMA, section 103(a) and (d), 43 U.S.C. § 103(a) and (d) (1976).

We observe that the record is replete with group and individual letters of protest or opposition from area residents, as well as congressional inquires initiated by several individuals. Those letters may be summarized and separated into several broad categories of concern: (1) erosional, environmental (including wildlife habitat), and aesthetic damage to the area caused by using the creek channel to transport the water 6 miles downstream to its place of use; (2) contamination of the creek's water supply occasioned by the subsidence near the well site due to the pumping of sand, particularly in the event of flooding, as well as the obvious hazard to persons or animals walking in the vicinity of the subsidence hole; (3) potential hazards in the event of severe flooding resulting from the location and design of the facility; (4) loss of bridges or crossings over the creek, as well as the destruction of water bars, due to the increased flow of water; (5) the use appellant intends for the water and protective stipulations in connection therewith; (6) lowering of the water table, depressions in the channel, and the drying or depletion of nearby supplemental springs and seeps allegedly caused by pumping of the existing well (No. 3); and (7) alleged loss due to evaporation of up to 50 percent of the pumped water during its 6-mile run to the place of use.

Proponents of the views summarized attended the public meeting on November 22, 1977, held for the purpose of discussing the EAR. While

we have before us a copy of the transcript of that meeting, it is garbled, and several key responses of appellant's principals are either missing or transcribed only in part. Little is to be gained, however, by setting forth individual comments elicited at the EAR meeting, with one exception.

Our reading of the EAR transcript suggests that some area residents were surprised and/or unaware of appellant's offer to convey the water by pipe (Tr. 18). The record further shows that when initially asked whether use of a pipeline would satisfactorily resolve the issue of alleged erosional damage, some residents answered in the affirmative, while others failed to respond to the question, instead voicing concern about matters more properly considered as stipulations or conditions to a right-of-way (Tr. 18-20). Larry Little subsequently called for a consensus, presumably by a show of hands. Two individuals stated agreement. A third had earlier suggested the same solution in connection with another point (Tr. 7). Thus, while the original proposal clearly engendered strong local opposition, it cannot be said that the record indicates opposition to every conceivable method of water conveyance.

Insofar as the environmental concerns expressed by the neighboring residents are concerned, we would emphasize that it is BLM's duty to examine such fears to determine whether if they are well founded or groundless. In this regard we note that the decision states: "BLM is not in the position to entirely refute the allegations of environmental damage to the private land * * * since our specialists have not had the opportunity to view the wash when the wells [sic] were operating * * *" (emphasis supplied). It appears to us, however, a great leap in logic to initially state that BLM is unable to "entirely refute" allegations of possible environmental degradation and then subsequently conclude that the proposal should be rejected because of the environmental damage from the action.

The EAR describes the soil of Johnson Creek near the well site as very deep alluvial silt loams characterized by downcutting of up to 40 feet in some places. The banks of the stream are vertical and unstable. EAR, p. 3. "Most of the downcutting occurred in the first part of this century, but the stream bank continues to actively erode." Id.

Bank erosion is attributed to "repeated freezing and thawing, wetting and drying from surface runoff that flows over the banks, and from flowing water in the stream channel. The greatest erosional losses occur during flooding when high flows undercut the banks." Id. In addition, periodic severe storms erode the stream floor and banks. EAR, p. 5. As compared to natural phenomena, "[T]he relative amount of erosion caused by the well is small." EAR, p. 11. It is pointed out, however, that the well water "could cause erosion in some critical reaches" where small waterfalls occur or the stream bottom elevation drops. Id. The well water could also wash out temporary channel crossings below the site. Id.

"No major differences in channel erosion between reaches upstream and downstream of the well could be detected. Soil disturbance and sand deposition was [sic] obvious at the site but the effects appear to diminish rapidly downstream." EAR, p. 12. Water filled depressions occurring at the outer edge of channel bends are attributed to the force of flood water; that the well water could have caused such depressions is considered "unlikely." Id.

While the artificially increased water flow at unsteady rates will hasten erosional processes and therefore decrease wildlife habitat, the "only critical pumping time" would be under ice pack conditions, because the velocity of forced water beneath ice increases geometrically. EAR, p. 14.

The point of diversion is described as a "source of high disturbance [to vegetation and habitat]." Id. That conclusion is derived from the fact that temporary earthen dams wash out, and that new earth from the surrounding area is removed to replace it. Id.

In contradistinction to the EAR's detailed discussion of the possible environmental effects, the decision of the State Office adverted to only three specific concerns: (1) the existence of the open subsidence hole which has caused a hazardous situation to the public and livestock in the area; (2) the possibility that during a flood stage in the wash, the flood waters could pollute the ground water aquifer through the well opening; and (3) the erosional damage caused down stream from the well site. We will examine these three concerns seriatim.

First, as regards the subsidence hole, there seems little question that the pumping of sand from the well has been the causative factor in the subsidence. It is equally clear that as it presently exists the hole does constitute a menace to the safety of the public and livestock. The questions which the decision does not address, however, are to what extent the present situation could be ameliorated, and to what extent future actions could be taken which would prevent recurrence of such subsidence. Appellant, while admitting the existence of the problem states that "[t]he existence of the hazard has been caused and prolonged by the inaction of the BLM, rather than by the appellant who believes that the subsidence problem can be quickly and safely resolved." While we are unable to determine how BLM was responsible for the existence of the subsidence, it is clear from the record that BLM has prevented appellant from attempting any ameliorative action. Thus, the EAR notes in this regard: "(Consultation between BLM, State Water Engineer and applicant will determine appropriate rehabilitation measures to be taken. No action will be taken by the applicant until such consultation has occurred and a rehabilitation plan prepared.)" (Emphasis in the original.) EAR, p. 15.

Appellant has not shown that the subsidence problems can be solved in the future. Apparently, however, it was never afforded an

opportunity to discuss this matter with BLM. The inference drawn by BLM that it cannot be solved seems purely speculative, and an insufficient basis, without more, for rejecting the application.

The possibility that flood waters might pollute the ground waters is of serious concern. What the decision does not consider, however, is that the EAR suggested that this possibility could be mitigated by increasing the height of the existing well above potential flood levels by adding 6 feet of casing. EAR, p. 15. Moreover, the EAR also stated:

> The extent of contamination which may occur would depend on the frequency and duration of flood events that cover the well casing. No data is available to evaluate how often this may occur. In an extreme case, bacterial pollution could possibly travel 100 to 200 feet through the underground aquifer. No domestic water supplies are within this distance of the well. [Emphasis supplied.]

EAR, pp. 9-10. Additionally, the possibility that flood waters might enter the underground aquifer is dependent upon the assumption that flood waters would cover the existing site. This is the position taken by the EAR. Thus, the EAR states that "during a field inspection in 1977, evidence was found of past flooding which exceeded the present elevation of the casing." EAR, p. 9. This assumption, however, is expressly attacked by appellant:

> In October, 1978, prior to the release of the EAR, Robert Cordova, U.S.G.S., on his own initiative, and Dr. Harry D. Goode, a recognized hydrological and geological authority on the Johnson wash area, extensively tested and observed the well. * * * The inspection and testing revealed that the top of the well casing and the ground water table are above the all-time high flood water mark (in direct contradiction to the assertions in the decision and the EAR), and about 16 feet above the surface of the stream.

Supplemental Statement of Reasons for Appeal, at 11.

In view of the above discussion, we are unable to sustain the rejection of the application on the basis of a perceived threat to the underground water supply. If BLM wishes to reject on this predicate, it will be necessary to supplement the record and address both the possibility of ameliorative actions and the question of whether the present site is subject to flood water inundation.

The third environmental basis was that downstream erosional damage has been caused by pumping the well. We do not find support for this conclusion in the EAR. On the contrary, the EAR specifically states that:

> Use of the wash to convey the water to the diversion dam results in some erosion in addition to that which occurs from natural occurring flows. The amount of erosion that may be caused by the well water is difficult to estimate because of the already badly eroded condition of the channel. Most of the bank cutting has occurred during flooding and, by comparison, the relative amount of erosion caused by the well water is small. [Emphasis supplied.]

EAR, p. 11. The EAR did not that the additional flow from the wells could "cause erosion in some critical reaches, particularly where there are small waterfalls or at other locations where the stream bottom elevation drops quickly," and could "wash out temporary channel crossings below the well site." Id. The field investigations, however, showed "[n]o major differences in channel erosion between reaches upstream and downstream of the well." EAR, p. 12. A number of erosion problems below the well site were pointed out to the field investigators, but they concluded that "[t]hese depressions appear to have been made by the force of flood water and it is unlikely that the amount of past flow from the existing well could be the cause." Id.

It is to be noted that the earliest field examination occurred in November, 1977, 2 months after pumping had been terminated. Thus, it is possible that the field investigation failed to disclose the true extent of the impact of the well pumping. Nevertheless, in view of the considerable disparity between the findings of the EAR and the State Office decision which was premised thereon, we find it impossible to sustain the rejection of appellant's application on this basis.

[4] It is clear, based upon the foregoing, that the EAR determined that natural processes are principally and historically responsible for most of the erosion occurring in the wash.

The EAR does support some of the decision's findings regarding hazards associated with the design of the existing facility. The EAR, however, discussed a number of mitigating actions which could be undertaken. There is no evidence that the use of such safeguards and conditions were considered in the denial of the rights-of-way.

It is unnecessary to set forth and discuss in more detail the EAR analysis of the proposed project and the several alternatives thereto. We note, however, that the mitigative action suggested for the project as proposed would have only two residual effects, one of which is curable by revegetation. The other concerns use of the stream channel as the transport mechanism. 8/ Absent a clear indication of a nexus

8/ It is noted in the EAR that appellant's proposal to transport the diverted water to his land via a pipeline would probably reduce the amount of soil which was being deposited in the stream channel. EAR,

between appellant's well pumping and increased degradation of the channel, we find this an insufficient basis upon which to predicate rejection. We conclude that BLM failed to adequately consider all of the factors involved, including whether less stringent alternatives would accomplish the intended purpose. California Association of Four-Wheel Drive Clubs, 30 IBLA 383 (1977); Stanley S. Leach, supra; cf. Questa Petroleum Co., 33 IBLA 116 (1977); Rosita Trujillo, 20 IBLA 54 (1975).

We are similarly unpersuaded by the correctness of BLM's concern that approval of the rights-of-way will inevitably result in a deluge of similar applications by other residents. No resident has claimed, threatened or suggested either at the public meeting or in letters that he or she intends, needs or contemplates similar action.

The final section of the decision is captioned "Flood Plains." We are in general agreement with the summary of Exec. Order No. 11988, supra. However, the Executive order requires affected agencies "to avoid direct or indirect support of flood plain development wherever there is a practicable alternative" (emphasis supplied). As earlier stated, comparison of points and evidence in support of the public interest and environmental sections of the decision, as against the EAR analyses and alternatives, leads us to the conclusion that there may be practicable alternatives to the proposed action. Moreover, if as contended by appellant, the well site is above the high flood level, the proposed action would not constitute "flood plain development."

The third ground asserted in support of the flood plain rationale is that appellant has applied for a cost-sharing grant, which triggers

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fn. 8 (continued)
pp. 17-18. This possible solution, however, was apparently discounted owing to the opposition of the adjacent land owners. Thus, the land report stated:

"[This alternative] which would require the applicant to transport the water by pipeline along the Johnson Canyon highway right-of-way seems to be a reasonable mitigation to the erosion problem. However, other problems associated with this alternative have been identified such as Kane County has the only easements across much of the private land in the canyon and approval for the pipeline R/W would have to be negotiated with the property owners. In personal conversation with some of the property owners statements were made to the effect that easements across their private ground would never be granted to East Canyon Irrigation Company."

While opposition by the property owners might well prove preclusive of consideration of this alternative, inasmuch as we are remanding this matter for further consideration, BLM should reexamine this question to redetermine whether opposition has remained fixed. It would be proper for BLM to request appellant to furnish firm evidence that the necessary permissions have or can be obtained.

the stringent guidelines imposed by the Executive order on Federally funded projects. Appellant states that the grant was cancelled when BLM advised the county ASCS that the land and field reports used in considering the SLUP were inadequate for consideration of a second well. It therefore appears, at this juncture, that Federal funds are not involved in the project and that this reason is not presently a proper ground for rejection.

[5] Regarding the SLUP, appellant argues that the decision terminating the use was beyond the jurisdiction of BLM, on the theory that appeal of the rights-of-way decisions involves the same subject and therefore suspends further action on said subject until this Board renders its decision. In support of this proposition appellant cites 43 CFR 4.477(a) and several decisions of this Board applying that regulation or 43 CFR 4.21. Appellant's contention is incorrect.

The cited regulation and decisions state that the effect of a decision and any action pursuant thereto are suspended during the pendency of an appeal therefrom. The subject of an initial decision, in the context of preserving the status quo pending this Board's decision, is irrelevant. Notwithstanding the common subject matter, a temporary use permit is discrete from the right-of-way application. Indeed, it must be so, for as this Board has ruled, a TUP may not be utilized for any activity for which a right-of-way grant under section 504(a) of FLPMA is available. See James W. Smith, 44 IBLA 275 (1979). Appeal from rejections of the rights-of-way applications, therefore did not stay action on the former, and no error was committed in proceeding to terminate the SLUP.

[6] Appellant failed to remit the annual rental for the permit, and this alone constitutes sufficient grounds for terminating the use. 43 CFR 2920.4(a). 9/

Under the preceding analysis, the decisions rejecting the rights-of-way applications must be vacated for the reason that BLM failed to adequately and fairly consider all relevant factors and evidence, including modifications of the project as proposed. In the absence of fair and adequate consideration of all relevant data, we hold that the decisions are not based upon a reasoned analysis thereof.

9/ In this regard, we wish to note that the State Office was clearly correct as to the nature of the SLUP. By its expressed terms, it was limited to "drilling a test water well." Appellant acquired no rights through this SLUP to pump and convey the water. Indeed, stipulation No. 14, which was applicable to the SLUP, clearly stated that "[u]pon completion of drilling operation, the permittee will file a formal right-of-way application if water is to be pumped and conveyed." As we have noted in the text, supra, while the drilling of a test well may be a proper subject of a TUP, the actual pumping and conveyance must be effectuated through the vehicle of a right-of-way.

Specifically, BLM should fairly and fully consider: (1) the significance of appellant's offer to bury the powerline; (2) the protection afforded area residents under the change application and state law regarding degradation of abutting private property; (3) stringent conditions and stipulations with regard to appellant's intended use of the water, design of the facility, and resolution of subsidence and pollution hazards; (4) the effect of pumping as determined by actual observation; (5) the EAR analysis of the project as proposed, with special regard to the mitigative measures and residual impacts thereof; (6) each of the alternatives and corresponding mitigative measures set forth in the EAR, as against the particular complaints and allegations of local residents; (7) the EAR assessment of the principal and historic causes of erosion in the wash; and (8) whether the well sites are, in fact, situated below flood water levels.

As the foregoing points suggest, the rationale underlying the decisions to reject the rights-of-way applications is doubtful at best, and in significant instances, supra, unsupported by the record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision terminating special land use permit #U-11-6 is affirmed and the decisions appealed from are reversed and remanded for further consideration consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Anne Poindexter Lewis
Administrative Judge